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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 19, ORIGINAL

EX PARTE: IN THE MATTER OF L. W. BALDWIN AND GUY A. THOMPSON, TRUSTEES, ET AL., PETITIONERS.

## BRIEF OF TYRRELL & GARTH INVESTMENT COMPANY, PLAINTIFF IN THE STATE COURT, IN OPPOSITION TO THE ISSUANCE OF MANDAMUS

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tion upon the jurisdiction of Federal Courts in actions against trustees in bankruptcy as governed by the terms of Title 11, Sec. 46(a), U. S. C., as enacted in 1898. The trustees in bankruptcy of railroad corporations appointed pursuant to the 1933 amendment are still only bankruptcy trustees for Federal jurisdictional purposes. Said trustees in bankruptcy of railroad companies under the 1933 amendment are not entitled to remove to the Federal Courts actions against them as such otherwise than in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and adverse claimants ..... 28

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The return by Honorable Thomas M. Kennerly, Judge of the District Court of the United States for the Southern District of Texas, to the rule shows in substance that the cause was heard and considered in the court below on the petitioners' application and amendment thereto for removal and certiorari, and upon the Answer thereto by Tyrrell & Garth Investment Company in opposition to removal. To the Answer was attached copy of its petition in the State Court and also copy of an order entered by it in the State Court dismissing such part of its cause of action in the State Court as sought an injunction against petitioners.

We desire to observe at the outset that the statement of the nature of the case as made in this Court by the petitioners for mandamus is too meager and detached to give this Court any comprehensive understanding of the controversy in the State Court.

We, therefore, present the following:

## Additional Statement of the Nature of the Suit in the State Court and of the Proceedings in the District Court of the United States

The suit in the State Court was against Houston North Shore Railway Company and its lessee Beaumont, Sour Lake & Western Railway Company, both owing their corporate existence to the laws of Texas and having their domiciles therein, and against L. W. Baldwin and Guy A. Thompson, the latter two as trustees in bankruptcy of said two railway defendants, under appointment of the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri. Such appointment of said trustees in bankruptcy was made in cause No. 6935, in the Matter of Missouri Pacific Railroad Company, in proceedings for the Reorganization of a Railroad under amendments to the Bankruptcy Act of Congress of 1933. This Act will be hereinafter more fully referred to and discussed. Harry K. Johnson, a resident of Texas, was also a party defendant in the State Court, and his connection with the case will appear briefly in the statement of the case we are about to make.

Plaintiff Tyrrell & Garth Investment Company, for its cause of action alleged that its predecessor, W. C. Tyrrell Trust (to all of whose rights it became successor), being desirous of having an interurban railway

constructed to and through its several thousand acres of land in the vicinity of Houston, for the purpose of adding to the value of its lands, entered into a contract in writing with Harry K. Johnson for its promotion and operation. It was agreed with said Johnson to convey to him, as promoter of the railroad, a right of way, subject to forfeiture for non-user and failure of operation. The terms non-user and failure of operation, as used in the contract, were therein specifically defined. "Non-user" was defined as failure to operate as an interurban railroad for thirty successive days. "Operation" was defined as including a passenger schedule over which first-class coaches operated by electricity or gas engines must be run over the entire line of about thirty miles on a regular schedule of at least one train not less than every two hours from 6 A. M. until midnight.

As further consideration, there was conveyed to Johnson about eleven hundred acres of land as a bonus. Plaintiff further alleged that failure to furnish the prescribed interurban schedule not only resulted, under the terms of the contract, in the forfeiture of the right of way but, more especially, that such failure to operate it constituted a breach of the contract, resulting in large damages to plaintiff by reason of decreased value of their lands.

It was alleged that the privileges and obligations of Harry K. Johnson under said contract passed to the Houston North Shore Railway Company, which assumed the benefits and obligations of the contract; that the railway was duly constructed and put in operation by the latter, and that for several years the contract was carried out and performed by the parties according to its terms.

Plaintiff alleged that in December, 1931, the defend-

ant railways discontinued and since then have ceased operation of electric passenger coaches into the City of Houston, in breach of the contract to operate the schedule over the entire line as in the contract provided, and that the operation of the cars did not include passing over the entire right of way, as set forth in the contract and right of way deeds. Plaintiff further alleged that in February, 1933, the defendant railway companies wholly stopped and that since said time they have ceased maintaining any interurban passenger service over the entire line of railway and over the donated rights of way on a regular schedule of at least one train not less than every two hours of each day from 6 A. M. until midnight, as in said contract and right of way deeds agreed to be done. Plaintiff alleged in detail the violation of the contract in the respects above mentioned.

Plaitniff alleged that it elected to declare a forfeiture, under the terms of the contract, of said easements and rights of way on account of said breaches of the contract, and to declare that the railway companies and their said bankruptcy trustees had no further rights or privileges therein by the terms of the contract and under their deeds, and prayed that the latter should be cancelled and held for naught. It was further alleged that the failure to maintain the passenger service agreed to be furnished and the permanent curtailment and limitation of the service had resulted in great depreciation of the market value of plaintiff's lands by reason of making them less accessible and convenient to transportation; that said violations of the contract had depreciated the value of its property in the sum of $150,000.00, in which amount it had been damaged.

It was alleged that the consideration on which it had donated the eleven hundred acres of land as a bonus had

at least partially failed, and plaintiff prayed for judgment for an equitable diminution and recovery on account thereof.

Plaintiff prayed for judgment against the railway companies and their bankruptcy trustees for cancellation of the right of way deeds covering several miles of the right of way, under the terms of the contract relating to forfeiture, and for its damages of $150,000.00 for breach of contract to maintain the local intrastate passenger interurban schedules provided for in the contract, and for a recovery against Harry K. Johnson growing out of partial failure of consideration from said donation of eleven hundred acres of land.

Plaintiff further prayed that on final hearing, in event judgment was rendered for cancellation of the right of way deeds, the railway companies and their trustees be enjoined from further use for railway purposes of the forfeited rights of way. (R. 63-83.)

Prior to hearing of the motion for certiorari to remove to the Federal Court, plaintiff dismissed so much of its cause of action in the State Court as sought any injunctive relief against the railway defendants and their trustees in bankruptcy (and tendered to the United States District Court a certified or admitted copy of such decree of dismissal), without prejudice to plaintiff thereafter to seek such injunctive relief against said *railway companies* "when and if they shall be discharged from jurisdiction and control of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri" (R. 61).

Plaintiff's petition in the State Court did not seek to interfere with the control of the District Court of Missouri in the administration of the properties, but prayed for "such relief, special and general, legal or equitable,

as against all the defendants including said trustees as it may be properly entitled to receive" (a permissible and effective prayer under the practice in Texas, where all legal and equitable distinctions of pleadings in causes of action have been abolished and the two systems blended). *Const. of Texas*, Art. V. Sec. 8; Art. 1906; Art. 2003, Revised Civil Statutes of Texas, 1925; *De La Vega v. League*, 64 Tex. 205; *Georgetown Mercantile Co. v. First Natl. Bank*, 165 S. W. 73; *Banks v. Blake*, 143 S. W. 1183. Moreover, plaintiff, still seeking not to interfere with the Missouri Court, further in the State Court prayed that its *"said judgment be certified to the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri, for observance"* (R. 83).

## POINT I

**The Allegations Made by Plaintiff in the Suit in the State Court Show on Their Very Face That the Cause Is Not Removable Under Sec. 76, Title 28, U. S. C.**

Sec. 76, Title 28, merely provides for removal "for or on *account of any act done* under color," etc. It is obvious from plaintiff's petition in the State Court that the trustees in bankruptcy were not sued for or on account of "*any act done*" by them.

This is clearly shown by the fact that plaintiff alleged that in *December, 1931, the railway companies* stopped and have since ceased operation of electric passenger coaches into the City of Houston, in breach of the agreement to operate the schedule over its entire line as in the contract provided (R. 75), and that in *February, 1933, the railway companies* stopped, and they and defendant trustees have since said time ceased, maintaining passenger service passing over the entire line of railway on a regular schedule of at least one train not less than every two hours of each day from 6 A. M. until midnight (R. 76). These two alleged violations of the contract constitute the gravamen of plaintiff's cause of action as shown by its petition in the State Court (R. 63-83). These are the only respects in which it is alleged the contract has been violated.

Now, turning to the exhibits attached to petitioners' petition for removal, it is shown by the certified copy of the order of the Missouri Court appointing the bankruptcy trustees of defendant railway companies that they were not appointed such until *June 22, 1933* (R. 46-49), when their temporary appointment was provided for. The order appointing them was not made permanent until *July 25, 1933* (R. 50-55).

The allegations of plaintiff's petition in the State Court were that the contract and deeds "*provided that the defendants were to have and hold the same as an easement or right of way for the construction and operation of an interurban railroad upon the following conditions, viz: that the right of way and occupancy of said land should be forfeited in the event of failure to operate thereon an interurban railroad for a period of 30 successive days, exclusive of such time as operations might be prevented by conditions over which grantee had no control.*" The petition continues: "It was provided in said deed that operations as an interurban railroad, as therein contemplated, must include a passenger schedule with first-class coaches operated by electricity or gas engines, passing over the entire right of way therein or thereafter granted by said Johnson or his successors in interest to defendant Houston North Shore Railway Company; said coaches to be operated on a regular schedule of at least one train not less than every two hours from 6 A. M. until 12 o'clock midnight."

Thus it is shown that the *acts* complained of giving rise to plaintiff's cause of action were begun and completed by the railroad companies long before the appointment of the trustees and before the bankruptcy petition of the railway defendants was filed, which was on *May 2, 1933* (R. 37-41).

The contract on which suit was brought provided, as alleged by plaintiff, that "non-user" was *failure to operate* as an interurban railroad for a period of *thirty successive days;* and "operation as an interurban railroad" was defined therein as "a passenger schedule over which first-class coaches, operated by electricity or gas engines must be run over the entire line on a regular schedule of at least one train not less than every two

hours of each day from 6 o'clock A. M. until 12 o'clock midnight."

With these definitions in the contracts and alleged in plaintiff's petition, it follows necessarily that the breach of the contract was complete thirty days after the breaches began and, therefore, long before the bankruptcy petitions were filed. To say the very least, the breach was complete *thirty days after February, 1933*, when the two-hour schedule ceased, to say nothing of the failure to operate interurban electric coaches over the entire line, which was discontinued and has ceased ever since *December, 1931*.

Consequently, the trustees were not sued "for or on account of any *act done* under color of (his) their office or in the performance of (his) their duties as such officers," the language of the statute. Plaintiff pleads in its petition in the State Court that the forfeiture and breach of contract were complete before any adjudication in bankruptcy was had, viz, thirty days after the respective omissions began on December, 1931, and February, 1933.

The status of the trustees and the railway defendants in bankruptcy merely is that after the adjudication on May 2, 1933, and the appointment of the trustees on June 22, 1933 (R. 46-49), they acquiesced in what the railroads themselves had long prior already done. The trustees merely did nothing about it after their appointment.

The acts done were begun and completed by the railway defendants prior to bankruptcy, and the cause of action alleged by plaintiff was completed long before the Missouri Court acquired any jurisdiction. The trustees and the bankrupts have merely not tried to rectify the breaches of contract by the railroad companies, and

by virtue of which breaches it is alleged by plaintiff that the forfeiture and breaches of contract were complete before bankruptcy ensued.

Indeed, it would not have affected plaintiff's cause of action if the trustees and the railroads (after adjudication was made) had begun to maintain the schedules and perform the contracts. *Therefore the railroads themselves had completed plaintiff's cause of action before they came under the jurisdiction of the District Court of Missouri.*

It seems, therefore, quite clear that Sec. 76, under which the removal is sought, has no application. The language therein is "on account of any act done under color of his office." Certainly mere repose or quiescence are not *acts done* under color of office. The "color of office" has nothing to do with it, and it seems to us that "color of office" is quite beside the mark. We think it was not the purpose of the statute (and much less the language of it) for the Federal Court to assume jurisdiction of a non-federal question when the defendant asserting the right of removal *has done no act.* And, be it remembered, that if the trustees are not entitled to removal under Sec. 76 they are not entitled to removal at all.

They are not seeking the right of removal on account of the existence of any Federal question involved on the face of plaintiff's petition.

It is submitted that the decisions of this Court have already settled the question at issue against petitioners' contention.

In the case of *Maryland v. Soper,* 270 U. S. 9, 36, 44, opinion by Mr. Chief Justice Taft, it is said:

> "In respect of the removal of state prosecutions, there should be a more liberal use of mandamus than in removal of civil cases."

This quotation is made because the cited case was a criminal prosecution originating in a State Court and sought to be removed by certiorari under Section 76, the procedure here followed by petitioners. In the Soper case, this Court said, further:

> "The prosecution to be removed under the section must have been instituted 'on account of' *acts done by the defendant* as a Federal officer under color of his office or of the revenue or prohibition law. There must be a causal connection between what the *officer has done* under asserted official authority and the State prosecution. It must appear that the prosecution of him for whatever offense has arisen out of the *acts done by him* under color of Federal authority and in enforcement of Federal law, and he must by direct averment *exclude the possibility* that it was based on acts or conduct of his, not justified by Federal duty."

Further:

> "It is enough if the prosecution for murder is based or arises out of the *acts he did* under authority of Feleral law in the discharge of his duty and *only by reason thereof*."

And further:

> "In answer to the suggestion that our construction of Sec. 33 (Sec. 76 U. S. C.) and our failure to sustain the right of removal in the case before us will permit evilly minded persons to evade the useful operation of Sec. 33, we can only say that if prosecutions of this kind come to be used to obstruct seriously the enforcement of Federal laws, it will be for Congress in its discretion to amend Sec. 33, so that the words 'on account of' shall be enlarged to mean that any prosecution of a Federal

> officer for any state offense which can be shown by evidence to have had its motive in a wish to hinder him in the enforcement of Federal law may be removed for trial to the proper Federal Court. We are not now considering or intimating whether such an enlargement would be valid; but what we wish to be understood as deciding is that the present language of Sec. 33 cannot be broadened by fair construction to give it such a meaning. These were not prosecutions, therefore, commenced on account of *acts done by these defendants solely in pursuance of their Federal authority.*" (Our italics.)

It would seem to do violence to the language of the section to hold that the mere quiescence or repose of the petitioning trustees in the failure of the railroads to comply with their contract constituted acts done under color of their (the trustees') office. And, more especially so, since the breach of the contract, as alleged by plaintiff in the State Court, was complete and plaintiff's cause of action fully accrued against the railroads themselves before even the adjudication in bankruptcy was had or the petition therefor was filed. Certainly, it would seem clear that the case in the State Court was not, in the language quoted above, "commenced on account of acts done by these defendants (the bankrupts and their trustees) solely in pursuance of their Federal authority." The acts of the railroad companies themselves giving rise to plaintiff's cause of action were begun and the cause of action completed before the District Court of Missouri acquired jurisdiction.

## POINT II

**The Petition for Certiorari and Removal Presented by Petitioners to the United States District Court for the Southern District of Texas Was Wholly Insufficient in its Allegations of Fact to Have Justified That Court in Removing the Cause from the State Court to the District Court by Certiorari.**

The petition to the United States District Court for removal by certiorari is found in the Record, pp. 16-25. The substance of it consists merely in alleging that plaintiff in the State Court had brought suit on October 2, 1933, against petitioners to cancel certain deeds covering an easement and right of way over certain lands, "due to the alleged *failure* of petitioners to observe and comply with certain alleged conditions in said deeds contained, with respect to the operation of their trains." This was not an accurate statement, in that plaintiff alleged in the State Court that the respective breaches of contract had been begun by the railroads in December, 1931, and February, 1933, long before the appointment of the trustees or the adjudication (R. 75-76).

The suit against the railroads was filed on August 7, 1933, and the trustees were brought in by amendment on October 2, 1933 (R. 16-17). Petitioners for certiorari further set up in the District Court the plaintiff's prayer in the State Court for injunction (on final judgment) from the use of the portion of the right of way involved in the suit and plaintiff's prayer for damages. Thereupon, petitioners set up the history of the proceedings in the District Court of the United States for the Eastern Division, Eastern District of Missouri, with copies of the proceedings in that court, and alleged that "as such trustees, and such officers of court, they were, prior

to the institution of the suit first described, in possession and entitled to the possession of the lands, premises and properties described in plaintiff's petition in said suit" (R. 22-23).

Petitioners further alleged that the suit in the State Court "is a civil suit commenced in a court of the State of Texas against your petitioners, and each of them, as officers of a court of the United States, to-wit: the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri, and is a suit for and on account of acts done under color of the office of your petitioners, and each of them, and in the performance of the duties imposed upon your petitioners, and each of them, as such officers of court; and the necessary *effect of the institution and prosecution* of said suit in said State Court *is, and will be*, to materially interfere with and *obstruct the jurisdiction* and powers of said District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri with respect to the properties and assets of debtors, the Beaumont, Sour Lake & Western Railway Company and the Houston North Shore Railway Company, and each of them." (R. 23.) (Italics ours.)*

Sec. 76, Title 28, U. S. C., does not, *in any respect*, provide for removal by certiorari to the District Court because the proceedings in one court *might tend to interfere with those in another*. And this aside from the fact that plaintiff in the State Court, prior to hearing in

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*This being an original proceeding in the Supreme Court, we are filing herewith certified copy of an order concerning filing claims of creditors filed in the District Court, Eastern Division, Eastern Judicial District of Missouri, on May 15, 1933. It provides, among other things, that claims, "except as otherwise provided herein, may be liquidated in the jurisdiction where pending, subject to right of removal or appeal and subject to any stay orders entered in this proceeding."

the District Court of the petition for certiorari, specifically dismissed in the State Court any prayer for injunction or injunctive relief against petitioners even on final judgment (R. 61-62). Not only so, but plaintiff prayed only that the judgment in the State Court be certified to the United States District Court for the Eastern Division, Eastern Judicial District of Missouri, for such observance as the latter might give (R. 83).

The petition of plaintiff in the State Court was before and was considered by the Honorable District Court on the motion for certiorari, as shown by the Record, as well as by the return of Honorable Thomas M. Kennerly, United States District Judge, to the rule to show cause. Moreover, petitioners, by amendment to their petition for certiorari in the District Court, prayed that it be considered as an exhibit to their petition (R. 26).

Thus, plaintiff's petition in the State Court spoke for itself, and no nomenclature in the motion for certiorari on the part of petitioners could change its effect or substance. Their allegations were mere conclusions. No facts were alleged tending to show that the suit had been brought in the State Court "for or on account of any act done under color of office." The simple facts were that plaintiff had filed a suit against them in their official capacity for damages, and for adjudication of title to real estate on account of alleged non-feasance by the railroads before bankruptcy, and with respect to which non-feasance the trustees had been quiescent, the cause of action having been completed before adjudication and before the trustees were appointed.

That the petition for removal, when considered in connection with plaintiff's petition in the State Court, was insufficient in its allegations to justify the District Court in removing the cause by certiorari, see *Maryland*

*v. Soper*, 270 U. S. 9, 36, 44, very pertinent and implicit quotations from which have been made *supra*. See also *Colorado v. Sims*, 286 U. S. 510, opinion by Mr. Justice Butler. Both of these cases involved the very question of the issuance of mandamus by this Court to the District Court, and both arose under Sec. 76, which petitioners are now invoking. In the latter cited case it is said:

> "The burden is upon him who claims the removal plainly to set forth by petition made, signed and unequivocally verified by himself, *all the facts relating to the occurrence*, as he claims them to be, on which the accusation is based. Without such disclosure the court cannot determine *whether he* is *entitled* to immunity."

Further:

> "The statements of the petition are so vague, indefinite and uncertain as not to commit petitioner in respect of essential *details of the defense he claims*. They are not sufficient to enable the court to determine whether his claim of immunity rests on any *substantial basis* or is made in good faith." (Our italics.)

Mr. Justice Butler, in the same case, announced the following wholesome rule:

> "And it is axiomatic that the right of the States, consistently with the Constitution and laws of the United States, to make and enforce their own laws is equal to the right of the Federal Government to exert exclusive and supreme power in the field that by virtue of the Constitution belongs to it. The removal statute under consideration is to be construed with highest regard for such equality. Federal officers and employees are not, merely because

they are such, granted immunity from prosecution in State Courts for crimes against State law."

That the jurisdiction to remove under the invoked section rests and depends upon the statement of the facts as distinguished from the conclusions made in the petition for removal, see *Virginia v. Paul*, 148 U. S. 407.

It is nowhere alleged in the petition to the lower court for certiorari, nor is it shown in the exhibits thereto, that petitioners in their official capacity have done or suffered anything to be done, either of commission or omission, upon the authority, express or implied, of the Federal Court of Missouri. They do not allege that the Missouri Court has taken any cognizance of the controversy or has any notice of it. They do not allege any order of the Federal Court of Missouri or direction from it, general or special, remotely bearing upon the issue between them and the plaintiff. They do not allege that they have been confronted even with any choice of duty or action with respect to it.

The only permissible inference is that the allegations of fact upon which plaintiff brings the suit may or may not be true, and the petitioners do not at all commit themselves in the petition for certiorari to the lower court as to whether they are or are not.

We take it this does not meet the test laid down by this Court in the leading and controlling cases of *Maryland v. Soper* and *Colorado v. Sims*, *supra*. Such allegations do not exclude the possibility that the controversy arose outside of any connection with their duties as trustees in bankruptcy; they do not exclude the possibility that the controversy may have arisen because of a violation of the contract, *which even their Federal duty obligated them to perform*. They do not allege expressly or impliedly that any Federal law, rule or statute consti-

tutes any defense to the suit. They do not allege, by inference even, that any acts or any inactivity by them was *"solely in pursuance of their Federal authority,"* in the language of *Maryland v. Soper, supra.* They do not allege that the controversy arose or the suit was instituted by reason of their *discharge of their duty and only by reason thereof,* as laid down in the same case, or that their Federal duty has had anything to do with the controversy.

The language used by Mr. Justice Butler in *Colorado v. Sims, supra,* is directly applicable when it is said in the opinion that the "statements of the petition are so vague, indefinite and uncertain as not to commit petitioner in respect of *essential details of the defense he claims,* and that *"they are not sufficient to enable the court to determine whether his claim of immunity rests on any substantial basis."* The petition does not state *"all the facts relating to the occurrence,* as he (petitioner) claims them to be," *or any of the facts.* But solely because they are *trustees in bankruptcy* under the amendment to the Bankruptcy Act of 1933, they have chosen and rest upon their right of removal.

In Vol. XLVI, p. 91, *Harvard Law Review,* November, 1932, is an interesting treatise on "Mandamus in the Supreme Court Since the Judiciary Act of 1925." It is said that "Mandamus is an extraordinary remedy normally available only where other remedies are inadequate; it is equally true that today the Supreme Court can hardly be expected to assume voluntary jurisdiction in cases not involving issues of general or national importance;" that "a petition for mandamus (in the Supreme Court), like an application for certiorari, is addressed to the court's discretion."

Attention is therein directed to the fact that during

the seven terms intervening between the passage of the Judiciary Act of 1925 and June, 1932, seventy-two original motions were presented to the Supreme Court for leave to file such petitions, of which but five were granted, and of which latter number three involved the question of calling a three-judge court, and but two involved removal to Federal or remand to State Courts. Dealing with cases of mandamus before the Supreme Court to compel a lower court *to assume jurisdiction*, it is noted that during the seven terms then past, all the petitions of this type presented to the Supreme Court had been denied without opinion.

All of which seems to leave it apparent that one seeking mandamus in an original proceeding in this Court must show himself clearly and without doubt entitled to it; that he has no other remedy; that the lower court has abused its discretion in a clear case, and that the case as made in the lower court is so clear there is no room for exercise of discretion.

We submit, without further argument, that such is not the case made by petitioners in the District Court of the United States for the Southern District of Texas. They have shown no such clear right. Their petition to the court below is hardly more than an intimation of their conclusions, without a statement of any facts of alleged defense. If petitioners have a Federal defense to the suit in the State Court (for it is apparent no Federal question is shown on the face of plaintiff's petition in the State Court), they may set it up in the State Court and they have their remedy in the Supreme Court of the United States if the courts of the State of Texas deny them any justifiable Federal defense.

In the following Points III and IV we shall address ourselves to the propositions (1) that *trustees in bank-*

*ruptcy* as such do not have the right of removal under Sec. 76 by certiorari, *qua* their trusteeship; and (2) that the amendment of 1933 to the Bankruptcy Act has not changed the jurisdictional status of the petitioning trustees so as to accord them such right in this case.

## POINT III

**Should Point I and Point II above submitted and the arguments thereunder be ruled adversely to our contentions, then nevertheless the suit is clearly not removable into the District Court by certiorari, because:**

**Under the provisions of Title 11, Sec. 46(a), of the United States Code relating to bankruptcy, the United States District Courts have jurisdiction between trustees and adverse claimants concerning the property acquired or claimed by the trustee in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.**

Title 11, Sec. 46(a) of the United States Code provides that:

> "The United States District Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants *concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.*"

This statute was enacted in 1898 and has been on the statute books for nearly forty years. It has uniformly been construed to mean what it says. But it is now contended, in effect, in the case at bar that it has been repealed by Sec. 76, and that a trustee in bankruptcy as an officer of the courts of the United States enjoys the privileges of Sec. 76.

The contention of petitioners must necessarily be, in effect, that Sec. 76 repeals this statute of nearly forty years standing, otherwise (as we conceive), their contention for the right to removal by certiorari immediately falls.

Although the words contained in Sec. 76, under which the right of removal by certiorari is now contended for by petitioners, were inserted as an amendment to said section in the year 1916, now nearly twenty years ago, this is the first time, to our knowledge, that a contention has been made that trustees in bankruptcy, by virtue of the amendment, are entitled to remove causes out of the State to the Federal Courts by writs of certiorari to State Courts directing them to send up the record.

The recent opinion of the Circuit Court of Appeals of the Fifth Circuit, in the case of *Ruff v. Gay*, 67 Fed. (2) 684 (Advance Reports, January 22, 1934), held that a *receiver* under appointment of a Federal Court was not entitled to removal under Sec. 76 merely because he was such receiver nor because he was claiming the right of removal "for or on account of any act done under color of his office." The opinion was written by Circuit Judge Hutcheson, one of the profoundest lawyers on the Circuits, in the course of whose opinion it was held that it was not intended by Congress, by amendment of Sec. 76 in 1916, "to make a secret breach in the removal laws," nor "to open the floodgates of jurisdiction to pour into the Federal Courts all suits against Federal receivers."

United States District Judge Kennerly, in the case at bar, followed the holding of *Ruff v. Gay*, as shown by his return to the rule; the petitioners here being *bankruptcy trustees*. If the Circuit Court of Appeals of the Fifth Circuit thought that the floodgates were about to be opened by the secret breach in the removal laws as

pertains to *Federal receivers*, it is quite interesting that now the attempt is being made to open up the jurisdiction, under the 1916 amendment to Sec. 76, to *trustees in bankruptcy*.

Yet, it would appear, that if the one contention for the enlarged jurisdiction is sound, the other, by parity of reasoning, may be likewise so, and we shall have the anomalous situation that three sections of the Code relating to jurisdiction of the Federal Courts have been repealed by Congress (as we shall later attempt to show must follow), without reference having been made to them by name or number and without the knowledge of the bar or judiciary that such purpose was contemplated; without the knowledge even of the Congress that such had been done.

The opinion of the court in *Ruff v. Gay* will be discussed subsequently herein, as well as the question of repeal by intendment of the three suggested jurisdictional statutes, but at the moment we shall be concerned with but one of them.

We turn, then, again to the above quoted Sec. 46(a), Title 11, U. S. C. A., inhibiting jurisdiction to Federal Courts in cases against bankruptcy trustees. Briefly, we point out the construction which this Court and other Federal Courts have placed upon it ever since its enactment in 1898.

Under this statute it has been held that (quotations from Anno. Code):

> "It was not intended by this section to increase the jurisdiction of the United States courts in bankruptcy matters, but rather to limit it to such suits and controversies as are within the jurisdiction given such courts by the acts creating them, that is, controversies in law and in equity with adverse

> claimants where the requisite jurisdictional amount is involved and diverse citizenship exists (the citizenship test being, because of the Bankruptcy Act, that of the bankrupt and not that of the trustee), or there is a cause of action arising under the Constitution or laws of the United States. *Lovell v. Newman* (La., 1913), 227 U.S. 412, 33 S. Ct. 375, 57 L. Ed. 577. See, also, *Bush v. Elliott* (Ala., 1906), 202 U. S. 477, 26 S. Ct. 668, 50 L. Ed. 1114, 15 Am. Bankr. Rep. 656."

It has also been held that:

> "The clause of this section restricting the conferred jurisdiction 'in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants,' indicates the intention of Congress that the ascertainment, as between the trustees in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustees does or does not form part of the estate to be administered in bankruptcy, shall not be brought within the jurisdiction of the national courts solely because of the rights of the bankrupt and of his creditors having been transferred to the trustee in bankruptcy. *Lovell v. Newman* (La., 1913), 227 U. S. 412, 33 S. Ct. 375, 57 L. Ed. 577."

There is a very clear distinction with which, of course, this Court is familiar, between summary proceedings in bankruptcy to obtain possession of property colorably or fraudulently withheld from the possession of the trustee and plenary suits between the trustee and third persons where no act of bad faith or fraud is involved. In other words, *summary proceedings* in the bankruptcy court are authorized in some instances to regain and hold pos-

session of property claimed to belong to the trustee, and jurisdiction of the bankruptcy court as such attaches to a number of other cases upon their peculiar facts.

However, where there is merely a suit between the trustee and third parties as to the status of property and the respective interests of the trustee and third parties therein, it needs no citation of authorities for the proposition that such controversy must be determined by a plenary as distinguished from *summary proceedings* in the bankruptcy court.

Under the authority of Sec. 46, the United States District Courts have only jurisdiction "in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants" in cases that are not justified by *summary proceedings*. And:

> "It is well settled that property or money held adversely to the bankrupt can only be recovered by a plenary suit and not by a summary proceeding in a bankruptcy court. *Louisville Trust Co. v. Comingor* (Ky., 1902), 22 S. Ct. 293, 184 U. S. 18, 46 L. Ed. 413; *First National Bank of Chicago v. Chicago Title & Trust Co.* (Ill., 1905), 25 S. Ct. 693, 198 U. S. 280, 49 L. Ed. 1051; *Galbraith v. Vallely* (N. D., 1921), 41 S. Ct. 415, 256 U. S. 46, 65 L. Ed. 823."

It has been held that:

> "The mere fact that a person has been adjudged a bankrupt does not deprive other persons, owning or claiming purely legal rights to property claimed by the trustee, of having such rights adjudicated in the courts and by the procedure guaranteed to them by the Constitution. *In re Peacock* (C. C. N. C., 1910), 178 F. 851."

And in this connection see *In re: Midtown Contracting Company*, 243 F. 56, 155 C. C. A. 586 (certiorari denied), where it is held that if a real adverse claim exists, as distinguished from one which is merely colorable, the claimant can not be compelled to try the issue in the bankruptcy court; that if there is a real question, either of law or of fact, the claimant need not submit it to the bankrupt court, unless he consents to do so; but the trustee must institute his independent action in a court having jurisdiction of the subject-matter and have his claim regularly adjudicated, as the bankrupt himself must have done had bankruptcy proceedings not been pending. See, in this connection, *Wilds v. Department of Education*, 245 U. S. 654, 62 L. Ed. 532. It is well settled that a suit to quiet title lies against a trustee in the State Court without reference to the bankrupt court. *Rice v. Kelly* (Ky.), 10 S. W. (2) 1112.

That the jurisdiction of a District Court of a suit by an adverse claimant of property against a trustee in bankruptcy is expressly excluded by this section where it would not have had jurisdiction if the suit had been against the bankrupt, see *Hatch v. Curtin* (C. C. Mass., 1906), 146 F. 200, 16 Am. Bankr. Rep. 629. See, also, *Goodier v. Barnes* (C. C. N. Y., 1899), 94 F. 798.

That in all controversies between the trustee of the bankrupt's estate and a stranger or third parties, as to the title and ownership of property alleged to belong to the estate of the bankrupt, the jurisdiction of the State Courts is expressly preserved; and the trustee is relegated to such courts for the determination of his rights when the bankrupt himself should or could have litigated them therein, excepting as to proceedings under Sections 96(b), 107(e) and 110(e), unless the consent of the defendant has been obtained as required by the

statute, see *Bardea v. Hawarden First National Bank* (Pa., 1900), 178 U. S. 524; *Heath v. Shafer* (D. C. Iowa, 1899), 93 Fed. 647, 3 Am. Bankr. Rep. 88; *Cox v. Wall* (D. C. N. C., 1900), 99 F. 546, affirmed Wall v. Cox (C. C. A., 1900), 101 F. 403, certified questions answered (1901), 21 S. Ct. 642; *In re Nixon* (D. C. Mont., 1901), 110 F. 633, 6 Am. Bankr. Rep. 693; *Lawrence v. Lowrie* (D. C. Pa., 1903), 133 F. 995, 81 Minn. 341, 82 N. W. 1058, 83 N. W. 694, 95 N. W. 1015, 11 Am. Bankr. Rep. 152; *Jones v. Schermerhorn* (1900), 53 App. Div. 494, 65 N. Y. S. 999; *Nye v. Hart* (1901), 12 Ohio Cir. Dec. 419; *Breckons v. Snyder* (1905), 211 Pa. 176, 60 A. 575, 15 Am. Bankr. Rep. 112.

## POINT IV

**The amendment (47 Statutes, Ch. 204, Sec. 1; Title 11, Ch. 8, Secs. 201-205, U. S. C. A.) of March 3, 1933, to the Bankruptcy Act, does not in any respect change or amend Title 11, Sec. 46(a), U. S. C. The amendment of 1933 nowise affects the definite limitation upon the jurisdiction of Federal Courts in actions against trustees in bankruptcy as governed by the terms of Title 11, Sec. 46(a), U. S. C., as enacted in 1898. The trustees in bankruptcy of railroad corporations appointed pursuant to the 1933 amendment are still only bankruptcy trustees for Federal jurisdictional purposes. Said trustees in bankruptcy of railroad companies under the 1933 amendment are not entitled to remove to the Federal Courts actions against them as such otherwise than in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and adverse claimants.**

The amendment of 1933, we submit, will be examined in vain to find an intention to repeal or supersede the provisions of Title 11, Sec. 46(a), of the Bankruptcy Act, relating to jurisdiction of Federal Courts, in actions against the trustees of railroads in bankruptcy, which are provided for in the amendment. On the contrary, the amendment clearly evinces a purpose not to do so.

The amendment of 1933 provides, Title 11, Sec. 205, Par. C, that the trustee *"shall exercise all the powers of a trustee appointed pursuant to Sec. 72, or any other section of this Title."* Section 72, of Title 11, is that provision of the Bankruptcy Act which provides that the

creditors of a bankrupt estate shall appoint a trustee in bankruptcy, or, if the creditors do not appoint such trustee, the court shall do so. Therefore, the trustees in the case at bar are yet only trustees in bankruptcy, with the additional powers given to them under the 1933 amendment.

There is nothing in the amendment of 1933 to show that a trustee for a railroad company in bankruptcy has any other status, *with respect to jurisdictional purposes*, than a trustee appointed under the bankruptcy statutes. The trustees, under the amendment, are still trustees in bankruptcy, although, under authority of the court, they are given certain rights to operate the railroads. *Trustees in bankruptcy, before the amendment, could likewise operate property of bankrupt estates under order and permission of the court.*

So that the fact that the trustee (and in some instances the bankrupt railroads) are permitted under the amendment to continue to operate the railroads under the direction of the court, does not in fact change the character of the trustees from being nevertheless *trustees in bankruptcy.*

Provisions are made in the amendment for the "debtor (railroad) to present its plan of reorganization" before the Interstate Commerce Commission, and for the debtor to accept the plan of reorganization and under certain provisions to "have full power and authority to put into effect and carry out the plan." Moreover, in Sec. 205, Par. N of Title 11, of the amendment of 1933 pertaining to railroads, it is provided that "the *jurisdiction* and powers of the court, the duties of the debtor and the *rights* and liabilities of the *creditors, and of all persons with respect to the debtor and his property*, shall be *the same as if a voluntary petition for adjudication had*

*been filed and a decree of adjudication had been entered* on the day when the debtor's petition was filed."

This provision has reference to the general provisions of the Bankruptcy Act, and in no sense enlarges the jurisdiction of the Federal Court over the trustees of the railroad *for Federal jurisdictional purposes.*

As showing that the distinction between an equity receiver of a railroad and a trustee in bankruptcy, under the amendment, undoubtedly exists, and that the trustees in bankruptcy under the amendment are not in any sense Federal receivers, Sec. 205, Par. k, of the amendment provides:

> "If a receiver of all or any part of the property of a corporation has been appointed by a Federal or State court, whether before or after this chapter takes effect, the railroad corporation may nevertheless file a petition or answer under this section at any time thereafter, but if it does so and the petition is approved the trustee or trustees appointed under the provisions of this section shall be entitled forthwith to possession of such property, and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver with maximum limits approved by the commission. If a receiver has been appointed by a Federal or State court prior to the dismissal under subdivision (c), clause (7), of a proceeding under this section, the judge may include in the order of dismissal appropriate provisions directing the trustee to transfer possession of the debtor's property within the territorial jurisdiction of such court to the receiver so appointed, upon such terms as the judge may deem equitable

for the protection of the obligations incurred by the trustee and for the payment of administrative expenses and allowances in the proceeding hereunder."

We conclude from the foregoing provision of the amendment that the same distinction still exists now as heretofore between a receiver in equity of a railroad and a trustee in bankruptcy of a railroad under the 1933 amendment, and this by virtue of the terms of the amendment itself.

Even if it were held that a Federal receiver in equity were entitled to removal by certiorari for or on account of any act done in the performance of his duty, *qua* his being such receiver, it does not follow that a bankruptcy trustee may do so.

If he may, then this Court must hold, it seems to us, that Title 11, Sec. 46(a) was repealed by the amendment in 1916 to Title 28, Sec. 76, relied on by petitioners. This Court, it seems necessarily to follow, must also hold that the Federal Employers Liability Acts, which also expressly forbid removal, have also, as pertains to removal, been repealed by Sec. 76. This Court must also hold that the amendment to Sec. 76 has likewise repealed Title 28, Sec. 125, U. S. C., which provides that every receiver of property appointed by any court of the United States may be sued in any other court without previous leave, and which has been construed, since its enactment in 1887, as permitting the plaintiff to bring his action in the local courts and to have the justice of his demand there tried.

But we leave such consideration for discussion under the next Point. Opposing counsel have not been able to point to a case where a trustee in bankruptcy, merely because he was such, has been permitted to remove a

cause under the procedure here chosen and under the amendment to the statute here relied upon. We have been unable to find one. But *Jergens v. Bonded Products Corp.*, 13 Fed. (2) 417 (E. D. New York), specifically held that a bankruptcy trustee was not entitled to remove under the invoked section.

The amendment of 1933 to the Bankruptcy Act, extending the privileges of the Act under certain conditions to railroad companies, gives no suggestion of a purpose to amend the statute respecting jurisdiction of State Courts in ordinary actions against such bankruptcy trustees, but to our mind clearly evinces, by its specific terms above quoted, a contrary purpose.

We think, without question, that if the trustees in bankruptcy here can remove the cause to the District Court of the United States, then every trustee in bankruptcy may, for the same reason and under the statute here relied upon, remove each controversy with adverse third parties into the District Court. If this is a removable case, all controversies between bankruptcy trustees and third parties respecting contracts made by bankrupts before adjudication in bankruptcy are also removable under the statute here invoked. The same reasoning that would permit the one would, it seems clear to us, necessarily permit the other.

The floodgates of jurisdiction would then be opened widely indeed. For, be it remembered, the profession has not placed the construction on the amendment to Sec. 76 contended for, in effect, by petitioners, viz., that bankruptcy trustees are within its terms, although the amendment thereto relied upon by petitioners was enacted in 1916.

The Supreme Court of the United States will not, of course, hesitate, on account of considerations of juris-

dictional policy, to apply the law as it is written. But we submit that a proper construction of the statutes in question does not lead to the conclusion of any implied repeal of the jurisdictional statutes. That question we shall now notice briefly.

## POINT V

It is insupportable to conclude that the amendment to Sec. 76, Title 28, U. S. C. (providing for removal to the District Courts by certiorari of suits commenced in courts of the State against officers of the courts of the United States, for or on account of acts done under color of their office or in the performance of their duties) has resulted in the repeal of Title 11, Sec. 46(a), U. S. C. (limiting Federal jurisdiction in suits against bankruptcy trustees concerning property acquired or claimed by the trustees in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants).

Repeals by implication, under a long line of decisions by the Supreme Court, are not favored. Moreover, Sec. 46(a) is a prior statute (1898) relating to the PARTICULAR case involving jurisdiction of the Federal Courts with respect to trustees in bankruptcy; while the amendment to Sec. 76 (1916) is a subsequent law most GENERAL in its operation. The fact that the latter is GENERAL and the former SPECIAL creates a presumption that the SPECIAL is to be considered as remaining an EXCEPTION to the GENERAL. A special statutory provision affording a remedy for SPECIFIC CASES is not repealed by a GENERAL LAW unless the repeal be in express words or the conclusion of a purpose to repeal be irresistible.

## POINT VI

**More especially is our proposition advanced in Point V unassailable, when it is considered that if the amendment to Sec. 76 should be held to repeal the special statute in Point V referred to, then it would have to follow, by parity of reasoning, that the amendment to Sec. 76 also repealed two other special and prior statutes in limitation of Federal jurisdiction, viz., (1) Title 28, Sec. 125, U. S. C. (1887), permitting every receiver appointed by a United States Court to be sued in the courts of the States without previous leave of the court in which such receiver is appointed; and (2) the prior (1908) Federal Employers Liability Acts, which by their terms forbid removals to the Federal Courts.**

The Honorable United States District Court made return to the rule that in refusing petitioners' application for removal, it acted in deference to the decision of the Fifth Circuit Court of Appeals in the case of *Ruff v. Gay*. It may be said, as a matter of course, that in following the opinion in *Ruff v. Gay*, the denial of petitioners' motion necessarily resulted.

If a Federal *receiver* is not entitled to removal, obviously a *trustee in bankruptcy* is not. But it does not resultantly follow that if a Federal *receiver* may remove that a *bankruptcy trustee* may. The two lie pretty closely parallel, however, so that argument for or against the one is apropos of the other. And yet, by virtue of the inhibition of the statute relating to the Federal jurisdictional privileges of bankruptcy trustees, and the very fact that since 1916, when the invoked amendment was passed, this is probably the case of first impression rais-

ing the contention that such trustees may remove for or on account of acts done under color of their office, it seems that the contention is far-fetched. For, to sustain it, the bankruptcy statute referred to would have to be considered as repealed by implication, a *non-sequitur*, indeed, from the fact of the enactment of the amendment invoked.

In 1888 the Congress enacted the following statute, now carried as Sec. 125, Title 28, U. S. C. It provides that:

> "Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

From the outset, the lower Federal Courts gave it the construction which the Supreme Court later distinctly approved in the case of *Gableman v. Peoria D. & E. R. Co.*, 179 U. S. 335, opinion by Chief Justice Fuller, decided in 1901. In that opinion Chief Justice Fuller said:

> "This act abrogated the rule that a receiver could not be sued without leave of the court appointing him, and gave the citizen the unconditional right to bring his action in the local courts, and to have the justice and amount of his demand determined by the verdict of a jury. He ceased to be compelled to litigate at a distance, or in any other forum, or according to any other course of justice, than he would be entitled to if the property or business were not being administered by the Federal court.

"The object of the section is manifest, and it is equally plain that that object would be open to be defeated if the receiver could remove the case at his volition."

Further:

"The question is whether the bare fact that the appointment of this receiver was by a Federal court makes all actions against him cases arising under the Constitution or laws of the United States, notwithstanding he was appoined under the general equity powers of the courts of chancery, and not under any provision of that Constitution or of those laws; and that his liability depends on general law, and his defense does not rest on any act of Congress. We are of opinion that the question must be answered in the negative, and that this has been heretofore so determined as the Circuit Court of Appeals properly held in this case. Bausman v. Dixon, 173 U. S. 113, 43 L. ed. 633, 19 Sup. Ct. Rep. 879; Pope v. Louisville, N. A. & C. R. Co., 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500; McKenna v. Simpson, 129 U. S. 506, 32 L. ed. 771, 9 Sup. Ct. Rep. 365; Provident Sav. Life Assur. Soc. v. Ford, 114 U. S. 635, 29 L. ed. 261, 5 Sup. Ct. Rep. 1104."

Trial by jury was one of the principal objects of the Act and it did away with the necessity of an equity intervention in the forum or jurisdiction of the receiver.

Although the amendment to Sec. 76 invoked by petitioners was passed in 1916, not until considerably after the decision in 1926 of *Barnette v. Wells Fargo Nevada National Bank*, 270 U. S. 438, opinion by Mr. Justice Stone, was it contended that the former statute had been superseded or repealed by the much invoked Sec. 76.

It is true that one of the District Courts, in *Matarazzo v. Hustis* (1919), 256 Fed. 882, had inferentially so held. That case, however, was a suit by an alien against a citizen. The Court held that the case was within the judicial power of the United States under the Constitution (Art. 3, Sec. 2), and was thus within the original jurisdiction of the District Court as defined by the Judicial Code and was thus a suit which might be removed. We regard it as weak, if any, authority for petitioners' contention in this case.

The case of *Newall v. Byram* (1928), 26 Fed. (2) 200, opinion by Circuit Judge Sanborn, while holding that a suit in the State Court against a Federal receiver was removable, *qua* his mere appointment under the equity powers of the District Court, discussed the question but very briefly. The statute above quoted, as well as the opinion by Mr. Chief Justice Fuller in *Gableman v. Peoria Ry., supra*, seem not to have been considered. We say so because the eminent judge does not discuss or advert to the statute of 1888 or to any assumed purpose of Congress to repeal it, and gives no consideration to any assumed purpose of Congress to change or amend the act.

The Circuit Court of Appeals of the Fifth Circuit, in a persuasive and convincing opinion by Circuit Judge Hutcheson, in *Ruff v. Gay*, held that the *Barnette* case, *supra*, did not support the contention that the former statute had been superseded. The Circuit Court of Appeals of the Eighth Circuit, in *Newall v. Byram*, 26 Fed. (2) 200, and some of the District Courts, have relied on the *Barnette* case as authority for removal of cases against Federal receivers merely because they are appointed under the general equity powers of Federal Courts. That, as a corollary therefrom, the Act of 1888

must be concluded to have been impliedly repealed by the amendment to Sec. 76, in 1916, goes without saying.

It was but natural and logical, and but another step in the same direction, for the contention to arise that the provisions of the Federal Employers Liability Acts (that, "no case arising under this Chapter and brought in any State Court of competent jurisdiction shall be removed to any court of the United States"), were also repealed by Sec. 76. Some of the Federal cases, *Behrens v. Byram*, 26 Fed. (2) 953; *Elliott v. Wheelock*, 34 Fed. (2) 213, have so held.

It was further quite to have been expected, and perhaps we shall have to concede, not quite illogical that the contention would sooner or later be made that the invoked amendment to Sec. 76 likewise repealed the provisions of the jurisdictional statute relating to suits against *trustees in bankruptcy*. And so the attempted encroachment grows.

The case of *Barnette v. Wells Fargo Nevada National Bank*, we submit, is not fairly susceptible to the construction thus placed upon it. In the first place, "The jurisdiction of the District Court was not challenged in the Circuit Court of Appeals," says Mr. Justice Stone in the opinion, "nor is it challenged here."

A petition for removal had been made and granted and a motion to remand had been denied by the District Court. The copies of the removal proceedings were omitted from the transcript on appeal under stipulation, to diminish the record. The Court continues: "It therefore does not affirmatively appear on what ground the removal to the District Court was sought, allowed and sustained." This Court held no more, on close analysis of the majority opinion, that that, "as the removal is not challenged here, we think the *presumption should be*

*indulged* that the removal was rightly taken, and that the District Court had jurisdiction."

Both the District Court and the Circuit Court of Appeals had assumed jurisdiction; the District Court having done so on mature consideration on motion to remand, a reviewable question on appeal, which plaintiff in the case had concededly passed as having been correctly decided by the District Court.

This Court could not well have deliberately concluded that the cause was removable on the ground that the defendant was a Federal receiver, and, likewise, at the same time, have reached the conclusion that "we think the *presumption should be indulged that the removal was rightly taken,* and that the District Court had jurisdiction." Moreover, said Mr. Justice Stone in the opinion, "But the record shows that shortly after the suit was begun, the Court of Alaska expressly authorized the receiver to appear in the suit and to make defense and present a counter-claim to it."

Mr. Justice Brandeis and Mr. Justice Sanford dissented and insisted that "this Court should, in its discretion, order that all papers in the D[illegible]ourt relating to the removal be filed here, so t[illegible]e may determine whether the lower courts have properly exercised jurisdiction." And, as further stated by Mr. Justice Brandeis in the dissenting opinion, it was not shown *"whether all the defendants joined in the petition for removal and, if not, by whom removal was sought; on what ground removal was sought, whether that ground was good in law and whether it was substantiated by the facts appearing of record; from what court the removal was sought; what action the court and the respective parties took; and whether, indeed, there was any proper petition for removal filed in time."*

Thus, it is apparent that the conclusion of the majority, viz., that, *"as the removal is not challenged here, we think the presumption should be indulged that the removal was rightly taken and that the District Court had jurisdiction,"* constitutes practically the whole force of the opinion as an authoritative expression. Obviously, this Court reached the conclusion that all the matters of question raised in the dissenting opinion by Mr. Justice Brandeis would be properly presumed for purposes of jurisdiction. *No one of them was less vital to jurisdiction than the other, and every one of them was inherently vital.*

The case, therefore, should not be regarded as further authority than the actual grounds on which it is essentially based. Having in deference to the District Court and the Circuit Court of Appeals indulged the presumption of jurisdiction in the courts below, the presumption was necessarily indulged *for all purposes and upon all grounds.* Thus, we think the case supports but slightly, if at all, petitioners' position.

We turn now to the question whether the enactment of the invoked amendment to Sec. 76 has resulted in the repeal of Sec. 46(a), U. S. C., relating to jurisdiction of trustees in bankruptcy and, concomitantly, in the repeal of Sec. 125, U. S. C., permitting Federal equity receivers to be sued in the courts of the States, and the repeal as well of the provision of the Federal Employers Liability Acts forbidding removals.

Repeals by implication are not favored. The invoked statute is a *general* law and each of the other acts operate upon *particular* cases. A special statutory provision affording a remedy for *specific* cases is not repealed by a *general* law unless the repeal is in express words or the conclusion of a *purpose* to repeal is irresistible.

If there is repeal of a statute by implication, it must be by judicial construction, and the *intent* to repeal must be clearly manifest. Therefore, the attempt is to discover and declare the legislative intent, for there is certainly no intent to repeal here expressed.

In the case of *Washington v. Miller*, 235 U. S. 422, this Court, speaking through Mr. Justice Van Devanter, said:

> "No repealing clause accompanied this provision, so the question is, did it repeal the provisos by implication? There is no doubt that, if taken literally, it would subject the Creek lands to the Arkansas law of descent and distribution without any qualification or restriction. But this would be only by reason of the generality of the terms, for it made no mention of that law or of those lands. In short, it was plainly a general statute, and did not show that the attention of Congress was then particularly directed to the descent of the lands of the Creek. On the other hand, Sec. 6 of the supplemental agreement and its two provisos dealt with that subject in specific and positive terms which made it certain that the Creeks and their lands were particularly in mind at the time. In these circumstances we think there was no implied repeal, and for these reasons: First, such repeals are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both (United States v. Healy, 160 U. S. 136, 146, 40 L. ed. 369, 373, 16 Sup. Ct. Rep. 247; United States v. Greathouse, 166 U. S. 601, 605, 41 L. ed. 1130, 1131, 17 Sup. Ct. Rep. 701; second, where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an ex-

ception to the general. (Townsend v. Little, 109 U. S. 504, 512, 27 L. ed. 1012, 1015, 3 Sup. Ct. Rep. 357; Ex parte Crow Dog (Ex parte Kaug Gi-Shin-Ca), 109 U. S. 556, 570, 27 L. ed. 1030, 1035, 3 Sup. Ct. Rep. 396; Rodgers v. United States, 185 U. S. 83, 87-89, 46 L. ed. 816, 818, 819, 22 Sup. Ct. Rep. 582)."

In *United States v. Greathouse*, 166 U. S. 601, this Court said:

"Those exceptions were not expressly abrogated by the act of 1887, and they could be held to be repealed only by implication. But repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, and are not absolutely irreconcilable, effect should be given, if possible, to both of them. Frost v. Wenie, 157 U. S. 46, 58 (39; 614; 619); United States v. Healy, 160 U. S. 136, 147 (40; 369; 373)."

And in *Red Rock v. Henry*, 106 U. S. 596, it is said:

"The result of the authorities cited is, that when an affirmative statute contains no expression of a purpose to repeal a prior law, it does not repeal it unless the two Acts are in irreconcilable conflict, or unless the later statute covers the whole ground occupied by the earlier and is clearly intended as a substitute for it, and the intention of the legislature to repeal must be clear and manifest."

In the case of *Petri v. Creelman*, 199 U. S. 487, it is said:

"It is elementary that repeals by implication are not favored, and that a repeal will not be implied unless there be an irreconcilable conflict between the two statutes. And especially does this rule apply where the prior law is a special act relating to

a particular case or subject, and the subsequent law is general in its operation."

And in the leading case of *Rodgers v. United States*, 185 U. S. 83, this Court quoted with approval both *Sedgwick on the Construction of Constitutional and Statutory Law* and *Black on Interpretation of Laws*, Both laid down the same rule, remarkably similar in effect, and since they both have had the approval of this Court, we quote them:

SEDGWICK:

"The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all."

BLACK:

"As a corollary from the doctrine that implied repeals are not favored, it has come to be an established rule in the construction of statutes that a subsequent act, treating a subject in general terms and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so as to construe it in order to give its words any meaning at all."

It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will not ordinarily affect the

special provisions of an earlier statute; that the terms of a general statute broad enough to include the subject-matter in the special will not be understood as repealing the special, unless a repeal is expressly named. *Rodgers v. United States, supra.*

Without quotation, we cite the following cases:

*Ex parte United States*, 226 U. S. 420;
*United States v. Healy*, 160 U. S. 136;
*Townsend v. Little*, 109 U. S. 504;
*Ex parte Crow Dog*, 109 U. S. 556;
*Great Northern Ry. Co. v. United States* (C. C. A.), 155 Fed. 945;
*General Motors Acceptance Corp. v. United States*, 286 U. S. 49;
*United States v. Burroughs*, 289 U. S. 49.

In the latter case, opinion by Mr. Justice Roberts, many of the above decisions are cited, and it is said:

> "Implied repeals are not favored, and if effect can reasonably be given both statutes the presumption is that the earlier is intended to remain in force."

We refer also to *Knapp v. Byram*, 21 Fed. (2) 217, where authorities on the subject are collated and admirably discussed.

The Circuit Court of Appeals of the Fifth Circuit has, in the opinion of *Ruff v. Gay*, given the legislative history of the invoked amendment to Sec. 76 in its passage through Congress. We shall not repeat that history, which is there better and more succinctly stated than we could state it. But, somewhat aside, it is but just to say that the court's brief opinion in *Ruff v. Gay* has added more of substance and more of compelling force to the solution of the question under review than we could have expected to accomplish.

Certain that this Court will necessarily read and consider it, we have not sought, by quoting from it, to detract from the finished result of its concise and persuasive reasoning when read as a whole. We believe this Court will regard it to be implicitly sound.

But petitioners have attacked it from pages 15 to 42 of their brief with the proposition that if the language of a statute is indubitably clear, the language is conclusive and there is no room for construction; that the legislative annals, then, cannot be referred to in order to create doubt as to construction when there is no room for construction. If the petitioners' hypothesis were sound, then their proposition would be applicable. We think the hypothesis wholly unsound in its implication.

We, too, believe there is little or no room for construction when all four statutes are considered as a whole, as must be done, for then it appears to us the whole adverse contention for removal becomes unsound.

But if there were doubt that, in accordance with settled rules of construction, there has been no implied repeal of these statutes or any of them by the language of the amendment to Sec. 76, then obviously, to clarify that doubt, this Court may have recourse to the reports of the committees of Congress. Circuit Judge Hutcheson's reference thereto in the opinion in *Ruff v. Gay* was entirely proper.

In *Binns v. United States,* 194 U. S. 486, this Court, speaking through Mr. Justice Brewer, said:

> "While it is generally true that *debates* in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body (United States v. Trans-Missouri Freight Asso., 166 U. S. 290, 318, 41 L. ed. 1007, 1019, 17 Sup. Ct. Rep. 540), yet it is

also true that we have examined the *reports of the committees* of either body with a view of determining the scope of statutes passed on the strength of such reports. Church of Holy Trinity v. United States, 143 U. S. 457, 464, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 511. When Sections 461 and 462 were under consideration in the Senate, the chairman of the Committee on Territories, in response to inquiries from Senators, made these replies:

'The Committee on Territories have thoroughly investigated the condition of affairs in Alaska, and have prepared certain licenses, which in their judgment, will create a revenue sufficient to defray all the expenses of the government of the territory of Alaska. . . . They are licenses peculiar to the condition of affairs in the territory of Alaska on certain lines of goods, articles of commerce, etc., which, in the judgment of the committee, should bear a license, inasmuch as there is no taxation whatever in Alaska. Not one dollar of taxes is raised on any kind of property there. It is therefore necessary to raise revenue of some kind, and in the judgment of the Committee on Territories, after consultation with prominent citizens of the territory of Alaska, including the governor and several other officers, this code or list of licenses was prepared by the committee. It was prepared largely upon their suggestions, and upon the information of the committee, derived from conversing with them.' Vol. 32, Congressional Record, Part III, page 2235."

This Court, opinion by Mr. Justice Pitney, in *United States v. St. Paul, etc., Ry. Co.*, 247 U. S. 310, also said:

"It is not our purpose to relax the rule that *debates* in Congress are not appropriate or even reliable guides to the meaning of the language of an enactment. United States v. Trans-Missouri Freight

Asso., 166 U. S. 290, 318, 41 L. ed. 1007, 1019, 17 Sup. Ct. Rep. 540. But *the reports of a committee*, including the bill as introduced, changes made in the frame of the bill in the course of its passage, and *statements made by the committee chairman in charge of it*, stand upon a different footing, and may be resorted to under proper qualifications. Blake v. National City Bank, 23 Wall. 307, 317, 23 L. ed. 119, 120; Church of the Holy Trinity v. United States, 143 U. S. 457, 464, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 511; Dunlap v. United States, 173 U. S. 65, 75, 43 L. ed. 616, 619, 19 Sup. Ct. Rep. 319; Binns v. United States, 194 U. S. 486, 495, 48 L. ed. 1087, 1090, 24 Sup. Ct. Rep. 816; Johnson v. Southern P. Co., 196 U. S. 1, 20, 49 L. ed. 363, 370, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Pennsylvania R. Co. v. International Coal Min. Co., 230 U. S. 184, 198, 57 L. ed. 1446, 1451, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315; Five Per Cent Discount Cases (United States v. M. H. Pulaski Co.), 243 U. S. 97, 107, 61 L. ed. 617, 621, 37 Sup. Ct. Rep. 346. The remarks of Mr. Lacey, and the amendment offered by him, in response to an objection urged by another member during the debate, were in the nature of a supplementary report of the committee; and as they related to matters of common knowledge they may very properly be taken into consideration as throwing light upon the meaning of the proviso; and not for the purpose of construing it contrary to its plain terms, but in order to remove any ambiguity by pointing out the subject-matter of the amendment. This is but *an application of the doctrine of the old law, the mischief, and the remedy.*"

The last italicized words in the foregoing statement constitute, in closely parallel language, the same reasons given by Judge Hutcheson in *Ruff v. Gay* for reference

to the committee reports of Congress in reaching a construction of the invoked amendment.

And in *Lapina v. Williams*, 232 U. S. 78:

> "The legislative history of the act of 1903 demonstrates that the elimination of the word 'immigrant' and other equivalent qualifying phrases was done deliberately. The bill originated in the House of Representatives, where the *committee report* declared that its general purpose was 'to bring together in one act scattered legislation heretofore enacted in regard to the immigration of aliens into the United States; . . . to amend such portions thereof as have been found, either as the result of experience in administering the law or of judicial decision, to be inadequate to accomplish the purpose plainly intended thereby; and to add thereto such further provisions as seemed to be demanded by the consensus of enlightened public opinion.' H. Rept. 982, 57th. Con. 1st Sess. The report of the Senate Committee likewise explained the bill as being in the main a re-enactment of existing laws on the subject of immigration stating: 'The necessity for such re-enactment is due in part to the fact that, as a result of judicial decisions, as well as of administrative experience, the efficiency of such laws to accomplish the evident purpose of their enactment has been shown to be materially less than appeared to be the case at the time of such enactment, and therefore a new expression of the legislative will upon the subject of immigration has become desirable.' The Senate inserted the word 'immigrant' in one place, but it was eliminated in conference. S. Rept. 2119, 57th Cong. 1st Sess; S. Doc. 62, 57th Cong. 2d Sess. Cong. Record, vol. 36, p. 2949, 57th Cong. 2d Sess." (All italics ours.)

Further quotations from the authorities to the same

effect would but enlarge the brief. We have made these quotations from the older cases to show that resort in case of doubt to the reports of congressional committees is no new thing with this Court. That the same rule continues to be followed, we need but to cite:

*Graham v. Goodell*, 282 U. S. 409, opinion by Mr. Chief Justice Hughes (statements in reports of legislative committees taken into account in construing the Revenue Act of 1928 relating to income taxes); *McLean v. United States*, 226 U. S. 374, opinion by Mr. Justice McKenna (the reports of committees in congress consulted as an aid to ascertain the motive of Congress in passing a statute); *Matson Nav. Co. v. United States*, 284 U. S. 352, opinion by Mr. Justice Stone (reports of committee on bill taken into consideration in construing statute); *United States v. Flores*, 289 U. S. 137, opinion by Mr. Justice Stone (doubt as to meaning of a statute is resolved by the report thereon of a legislative committee for revision of the laws).

If there is doubt as to whether all the four statutes should stand together, then, obviously, under the authorities above cited, this Court, as held in *Ruff v. Gay*, may seek the reports of the committees of Congress as aids in interpretation.

With no purpose expressed in the amendment of any intention to repeal any prior special jurisdictional statutes by the enactment of the invoked amendment of 1916, and with the beneficent rule of construction in mind that each statute "must be construed in connection with the whole, so as to make all parts harmonize, if possible, and give meaning to each," it seems clear that before this Court would hold that there was a repeal by implication *(usually if not always a question of grave doubt)*, it would consult the legislative history. Espe-

cially so, your Honors, when all of the four statutes may consistently stand as applicable to their respective spheres, the later one, Sec. 76, not repealing or affecting the particular ones parceling out the jurisdiction in *their special and particular cases.*

The amendment to Sec. 76 is, *after all, but an amendment to a statute*, and, it seems clear, that the intention of the Congress was to confine the operation of the amendment to the subject of the *particular statute which was amended.* When the contrary contention is asserted, doubt becomes at once powerfully implicit in the very nature of the assertion. The committee reports upon the amendment, as set forth in the opinion in *Ruf v. Gay*, then become highly pertinent.

Pages 42 to 60 of petitioners' brief constitute an argument against the proposition that the invoked Sec. 76 and amendment thereto apply only to actions brought *personally* against officers of the courts of the United States. One would gather from petitioners' discussion of the case that the Circuit Court of Appeals, in *Ruf v. Gay*, based its opinion *solely on such ground.* Such is a total misconception.

A careful reading of the opinion shows that the basis of the opinion was that the amendment was *not intended* to accomplish "the result that all suits against receivers are now removable," and that "the amendment was not intended by the Congress to so result." The real basis of the opinion is the conclusion of the court that it was not intended to make a secret breach in the removal laws "by an amendment of three lines, tucked away in a section of the code relating entirely to the removal of suits and prosecutions against revenue officers, and officers of the Congress, a section having no relation whatever to receivers nor even generally to removals."

And the opinion referred to the Act of 1887, providing that suits against Federal receivers may be brought in any State Court of competent jurisdiction without leave of the Federal Courts appointing them, and to the opinion of Mr. Chief Justice Fuller, in *Gableman v. Peoria Ry. Co.*, 179 U. S. 335, approving that construction of the act, which the lower Federal Courts had consistently put on it. The opinion further referred to the Federal Employers Liability Acts and to some decisions of lower Federal Courts that the invoked amendment of 1916 had been held to repeal the provisions of said Acts forbidding their removal.

Thereupon, the opinion continued with an argument and a citation of authorities to the end that "significance and effect" should be accorded to all the statutes so as to harmonize them and "give meaning to each."

Finally, the opinion referred to and quoted the reports of the congressional committee that the *object and purpose* of the amendment was not to accomplish the result contended for by the cited decisions with which the court disagreed. So that the reasoning and foundation of the opinion was, in substance, that the statutes should be construed together as a whole, each retaining its effectiveness in its sphere, and that the invoked amendment should not be held to repeal by implication the others.

The opinion does certainly convey the thought that it was the impression of the court that the intention of Congress was that the invoked statute was meant for the protection of the officer "in his own person or property," and not in his "representative capacity," but the opinion as a whole is of vaster signification than this. We do not regard the expressions in that respect as at all necessary to the result reached by the court.

Yet we believe them to be inherently sound and that

the purpose of the Act was to give Federal officers a trial in the Federal Courts in cases where it was contended by them that in acting in the performance of their duties they had incurred suits or actions against them in their personal capacity.

The length the brief has already attained forbids an argument of the propositions, even if we could be of assistance to the Court. The recent leading cases of *Maryland v. Soper*, 270 U. S. 9, 36, 44, and *Colorado v. Sims*, 278 U. S. 510, as well as the pertinent observations of United States District Judge Reeves in *Slover v. Chicago Ry.*, 16 Fed. (2) 609, would seem to lead to the view expressed in *Ruff v. Gay*.

But we submit that whatever should be the conclusion of this Court on this proposition, the mandamus applied for should be refused on the other grounds.

Neither shall we care to take issue at length with the opposing contention over the proposition that it has long been the purpose of the Congress to restrict within bounds the jurisdiction of the Federal Courts. We may say that if Federal receivers and bankruptcy trustees, appointed under the equity power of the Federal District Courts, may now and hereafter remove all controversies, Federal and non-Federal questions, into the District Courts for trial merely because of their appointment under the equity powers, then the floodgates of jurisdiction will be wide indeed. The Federal Courts will have an additional enormous part of the litigation of the country.

Notwithstanding what is opposingly said to the contrary, it has, indeed, been the policy of Congress since 1887 to contract the jurisdiction of the Federal Courts. *Gableman v. Peoria Ry.*, 179 U. S. 335; *Tennessee v. Union Planters Bank*, 152 U. S. 454. The changes of

apparent necessity brought about in that respect, as referred to by counsel, by the former national prohibition amendment are hardly apropos.

We respectfully pray that the rule to show cause may be discharged and the writ of mandamus denied.

Respectfully submitted,

LON E. BLANKENBECKER,

*Attorney for*
*Tyrrell & Garth Investment Company,*
*Plaintiff in the State Court.*

RICHARD W. FRANKLIN,

*Of Counsel.*

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CHARLES ELMORE
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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

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**No. 19, ORIGINAL**

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EX PARTE:

L. W. BALDWIN AND GUY A. THOMPSON,

TRUSTEES, ET AL., *Petitioners*

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## PETITIONERS' REPLY BRIEF

---

EDWARD J. WHITE,
FRANK ANDREWS,
HARRY R. JONES,
ROBERT H. KELLEY,
*Attorneys for Petitioners.*

Houston, Texas,
February 8, 1934.

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 13, ORIGINAL

EX PARTE:

L. W. BALDWIN AND GUY A. THOMPSON,

TRUSTEES, ET AL., *Petitioners*

## PETITIONERS' REPLY BRIEF

Since Petitioners' main brief was filed a return has been made to the rule to show cause. The return—

(a) Admits the facts alleged in the Petition for Mandamus;

(b) States that the decision by which the District Court refused to enter an order of removal "was made in deference to the decision, on November 15, 1933, of the United States Circuit Court of Appeals for the Fifth Circuit in *Ruff v. Gay*," which has since been reported in 67 Fed. (2d) 684, Adv. Ops. of January 22, 1934.

The situation, therefore, seems to be the same as though the Petitioners had been met by a general demurrer.

The following reply is submitted to the brief filed herein by Tyrrell & Garth Investment Company, which, for convenience, will be referred to as "Intervenor:"

**Intervenor's Point I:**

As we understand it, the first point made is that under Section 76, Title 28, U. S. C., only those suits may be removed which are brought against a Federal court officer "for or on account of any *act done* under color of his office or in the performance of his duties as such officer," the attempt being to distinguish an *act done* from a mere *omission to act*. The contention is then advanced that, as against the Trustees, the suit in the State court is not based on any positive or affirmative *act* on their part, but, at most, on "mere quiescence or repose" (p. 12).

It will be noted at the outset that Intervenor neither had nor claimed to have any leave from the bankruptcy court to sue its Trustees in the State court (Petn. for Mand., 63). Therefore, aside from Section 46, Title 11, U. S. C., which will be later discussed, it must have claimed the right to sue without such leave by virtue of Section 125, Title 28, U. S. C. But under Section 125 it has the right to sue a trustee without leave of the court which appointed him only "in respect of any act or transaction of his in carrying on the business." By suing the Trustees in the State court without the consent of the St. Louis Federal court, the Intervenor impliedly, but necessarily, claimed that the suit was "in respect of an *act or transaction* of the Trustees in carrying on the

business." In the present attempt, however, to defeat the right of removal under Section 76, Title 28, Intervenor now asserts that the suit is *not* one "for or on account of any *act done*" under color of the Trustees' office or in the performance of their official duties.

Sections 76 and 125 are *in pari materia*. The word "act" is used in each. The word "transaction" (in Section 125) connotes more action and less passivity than the word "act." We often speak of an "act of omission," but we never speak of a "transaction" by one who has been completely passive. Having invoked the jurisdiction of the State court on the ground that the complaint against the Trustees grew out of their *acts*, it does not now lie in the mouth of the Intervenor to claim that its cause of action rests on passivity and inaction rather than on action.

Seeking evidently to bring itself within the terms of Section 46, Title 11, U. S. C., Intervenor, in its brief (pp. 7-12), proceeds upon the theory that the suit in the State court involves *only* the title to certain real property, which, according to Intervenor's contention, was forfeited by inaction, through breach of a condition subsequent occurring prior to the appointment of the Trustees, and indeed prior to the institution of the reorganization proceeding. Such is not the case.

The petition in the State court (Petn. for Mand., 63-83) involves much more. It alleges "that defendant railway companies *and said defendant Trustees*, their agents and servants are * * * trespassers upon said property" (p. 77). It does not allege that there was a *complete* cessation of service for the requisite period prior to the bankruptcy. The gist of the allegations, on the forfeiture branch of the case, is that *the service which was given* (in the affirmative operation of the property under

the orders of the court) was not sufficiently extensive, as to the length of the runs, and not sufficiently intensive, as to the frequency of the runs, to satisfy the alleged condition.

It is also alleged that "the failure to maintain said passenger service and the *curtailment and limitation of the same*, which plaintiff alleges to be *permanent*" (that is, will be affected by the future operations of the Trustees) "has resulted in great depreciation of the market value of its properties * * * $150,000, in which amount it has been damaged" (p. 79).

Further allegations are to the effect that Intervenor's predecessor conveyed to one Johnson, as a bonus, 1,000 acres of land; that the consideration therefor was the passenger schedule "and since the same is not being carried out and *the defendants*" (all of them) "announce their unwillingness to carry the same out further than is being done * * * Johnson ought in equity * * * be required to make good such failure of consideration * * * and since it is impossible to carry out said schedule, the said defendant railroads and their said Trustees are likewise legally liable * * * on account of the said schedule being wholly within their control. Plaintiff says said railway defendants and their said Trustees have thus made the performance of said schedule by said Johnson wholly impossible * * * and that plaintiff is entitled to recover from defendants" (including the Trustees) "the further sum of $10,000" (pp. 81-82).

In spite of the dismissal by Intervenor of its prayer for injunction, it still prays, in effect, for an adjudication of the title to the property and asks that the deeds under which the Petitioners hold the property be cancelled and rescinded and that the clouds thus cast upon its title to the property be removed by the Court's decree.

It is obvious that the real complaint in this respect goes beyond the mere alleged failure to render a certain *quantum* and extent of passenger service, and involves the *continued and active possession* of the property by the Trustees and their *active assertion of title* thereto.

Therefore, the case in the State court is more than a simple suit for judicial ascertainment of a forfeiture which became complete before the jurisdiction of the bankruptcy court attached. It is a case in which the Trustees, as such, are charged with active trespass; in which property held by the Trustees is claimed to have been lost by them and great damages are claimed to have been sustained by Intervenor by reason of the *manner of operating the property*, not only by the Trustees, but also by the companies while they, under the supervision and orders of the court, were in charge of the operation of the property. It is a case in which damages are claimed by virtue of an alleged announcement made by the companies and the Trustees, and by virtue of their arrangement of schedules to produce an economical operation. The damages sought are claimed to arise, in part from the manner in which the Trustees intend to operate the property in the future, and in part from the depreciation in the market value of Intervenor's lands said to result from the Trustees' public announcement that they would not intensify the passenger service to and through those lands.

"Curtailment or limitation" of service, as alleged in the petition, can only result from *action*. Unless the companies or the Trustees should give affirmative orders to reduce the service, and should promulgate a new schedule, the old schedule would necessarily continue in force and be observed by their employees.

The case is not predicated solely on, and the plaintiff is not limited under its allegations to proof of, facts which occurred before the institution of the bankruptcy proceedings. If it were, there would be no basis for a claim of damages against the Trustees. In that event, the only damages suffered would be payable out of the bankrupt estate without preference, and under the same classification as other damages incurred by the companies prior to the bankruptcy. It is *not* claimed merely that the Petitioners *did nothing*. The claim set up in the State court is that *what was done* (including occurrences subsequent to the beginning of the bankruptcy) was insufficient to avoid a breach of the alleged condition and gave rise to the alleged claim for damages. The case, therefore, was clearly one "for or on account of *acts done*."

It is also clear from this statement of the nature of the case made by the petition in the State court that Intervenor cannot bring itself within the provisions of Section 46, Title 11, quoted in its brief (p. 21). From the statement just given, it is plain that the case described in the petition in the State court is not merely a controversy "concerning the property acquired or claimed by the Trustees." It contains other elements, including the element of damages. Consequently, Intervenor cannot assert successfully both that it had a right, without leave from the bankruptcy court, to institute the suit against the Trustees in the State court and that no jurisdiction exists, on removal, in the Federal court to which removal is sought. The first point made by Intervenor, therefore, puts it in a position of attempting to defeat the removal which is here involved on the ground that it had no right, either under Section 125, Title 28, or under Section 46 of Title 11, to invoke the jurisdiction

of the State court which it did invoke by the filing of its petition.

From what has been said above it appears that the facts, including the nature of the case made by Intervenor's pleading in the State court, destroy the contention made under Point I, even if we concede the correctness of the strict and narrow construction which Intervenor would have the Court place on the words "act done." But that construction, we submit, is incorrect, for the following reasons:

(a) Section 76, Title 28, under which the right of removal is claimed, should be liberally, and not narrowly, construed. See the quotation, on page 42 of our main brief from *Colorado v. Symes*, 286 U. S. 510. See also *Venable v. Richards*, 105 U. S. 636.

In addition to other matters mentioned in our main brief (pp. 33-42) special attention is directed to the Act of March 3, 1875 (18 Stat. 401), by which the right of removal under the special procedure, now provided in Section 76, Title 28, U. S. C., was extended to officers of either House of Congress. This extension was accomplished by attaching to a Sundry Civil Appropriation Bill, as Section 8, an amendment offered, on March 1, 1875, by James G. Blaine, then Speaker of the House (Cong. Rec., Vol. 3, pt. 3, pp. 2016-7).

The section so added not only provides for removal, but also for representation of the official defendant by the United States attorney for the district within which the action is brought; for the supervision and direction of the defense of such action by the Attorney General of the United States, and for the application to such action of certain laws relating to "the paying of judgments against revenue or other officers of the United States."

This amendment was the direct result of an action

for damages which had been instituted against Blaine on account of the fact that, as Speaker, he had signed a warrant, pursuant to a resolution of the House, for the arrest and detention of a contumacious witness before a committee of the House. *Stewart v. Blaine*, 1 McArthur (D. C.) 453.

(b) The construction contended for by Intervenor would lead to absurd results. If a United States marshal is sued for damages in a State court, for the wrongful levy of an execution on exempt property, Intervenor would concede his right of removal because the suit would be one "on account of an *act done*." But if the marshal is sued for *failing* to make a levy, because he thought the property exempt, Intervenor would say that case is *not* removable, because based, not on an act *done* but on an act *omitted*. Intervenor would also concede the right of the marshal to remove a criminal prosecution against him for negligent homicide growing out of the death of a pedestrian by collision with the marshal's automobile while the marshal was in hot pursuit of a fugitive for whose arrest he held a warrant. This offense, if the marshal is not otherwise violating the penal laws, is a mere misdemeanor under Article 1243 of the Texas Penal Code of 1925. But Intervenor would contest the marshal's right of removal if he was indicted, in connection with the same transaction, for failing to stop and render assistance to the person struck as required by Article 1150 of said Code. Under Article 1150, the so-called hit-and-run driver is guilty of a felony. Intervenor's contention would also permit the removal of a suit against a railroad receiver based on excessive speed and resulting personal injuries, but would deny removal in a case of failure to stop a train after discovery of the plaintiff's peril.

Manifestly, Congress never intended that such absurdities and incongruities should arise in the practical application of the removal provisions of Section 76.

(c) To construe the words "act done" so as to include failure or forbearance to act would do no violence to the natural and accepted meaning of the words. Under the primary definition of "act" in Webster's New International Dictionary we find the following:

> "Jurisprudence is concerned only with outward *acts*. An '*act*' may, therefore, be defined, for the purposes of the science, as 'a determination of will, producing an effect in the sensible world.' The effect may be negative, in which case the *act* is properly described as a 'forbearance.' The essential elements of such an *act* are three, viz., the exertion of the will, an accompanying state of consciousness, a manifestation of the will."

Looked at in this light a deliberate forbearance by a trustee, marshal, or other officer of court is an "act done," representing a conscious exertion and manifestation of the will.

(d) A liberal interpretation of the words "act done" is supported by judicial decision. As has been explained, the rule of liberal interpretation is affirmed in *Colorado v. Symes, supra*, and it has been given a practical application in the decisions of this Court. Attention in this connection is directed to the cases cited on pages 42, *et seq.*, of our main brief.

As more immediately in point, on the present question, we cite:

(1) *Cleveland, etc., R. R. Co., v. McClung*, 119 U. S. 454. In this case, the carrier transported certain dutiable goods to the port of Cincinnati and there delivered them to the collector of customs, giving him notice in writing

of the carrier's lien for freight charges. The collector delivered the goods to the consignee, collecting from him the duties and freight charges due thereon. He *failed* to account to the railway company for the freight charges and it sued him to collect the same. The court held that the action was one for the recovery of money that had been collected by the customs collector or his deputy and for which he had failed to account. Despite this fact, it concluded that the case was plainly removable under the involved section of the code.

(2) *Warner v. Fowler*, 29 Federal Cases 255, 4 Blatchf. 311, was an action against a postmaster, instituted in a court of a State. Damages were sought for the alleged failure of the postmaster to deliver a letter. The case was removed to the Federal court. On motion to remand, District Judge Ingersoll held that the case was removable.

(3) *Fischer v. Daudistal*, 9 Fed. 145, was a suit of foreign attachment in a State court of Pennsylvania. The sheriff was directed to attach certain goods in the possession of a collector of customs. He tendered the duties on the goods and the collector refused to release them. A rule was then issued in the State court, directed to the collector, to show cause why he should not accept the duties and release the goods. He removed the case by certiorari into the Federal court and a motion to remand was filed. It will be observed that the whole basis of the suit was the *failure* of the collector of customs to accept the duties and release the goods. Without opinion, Circuit Judge McKinnon and District Judge Butler overruled the motion to remand.

(4) *American Locomotive Company v. Histed*, 18 Fed. (2d) 656. The opinion of the court does not state the facts involved. A receiver, under appointment of a

Federal court, was sued along with certain other defendants. The opinion states that "the whole action is based upon alleged delinquencies on his (the receiver's) part." A motion to remand was filed. The court held that the cause was removable under Section 33 of the Judicial Code (Section 76, Title 28, U. S. C.).

The above list is not intended as a complete citation of authorities. These cases are simply illustrative of the common trend of the decisions in which the statute has been interpreted and applied. They indicate quite clearly that the statute reaches and embraces all acts done by Federal court officers, whether of omission or commission.

We have previously alluded to Section 125, Title 28, U. S. C. This section permits suits against a trustee without previous leave of the court which appointed him only "in respect of any act or transaction of his in carrying on the business." The similarity, between "act or transaction" as used in this section and "acts done" as used in Section 76, has been noted. It is interesting to observe that Section 125 has been given a very broad interpretation.

In *McNulta v. Lochridge*, 141 U. S. 327, this Court held that this statute with respect to the question of liability, placed the receiver in the position of the corporation; that the receivership was continuous; and that one receiver could be sued under this Section for a cause of action arising from acts of his predecessor in office.

In *Erb v. Morasch*, 177 U. S. 584, opinion by Mr. Justice Brewer, it was stated that the receiver under this Section, "is liable to suit in a court other than that by which he was appointed, even in a State court, for *disregard of official duty* which causes injury to the party sued" (Italics ours).

In *Nashville Railway and Light Company v. Bunn*, 168 Fed. 862, opinion by Judge Lurton, it was stated that the statute reached and embraced "suits growing out of the operation by the receiver of the property in his possession."

This we believe to be the proper interpretation, not only of Section 125 but of Section 76 as well. Certainly, the decisions support this view. This Court well knows that Section 125 has been interpreted both by State and Federal courts as permitting suits against receivers, without previous leave of the appointing court, on any and all causes of action arising out of their operation and management of the property, except in those cases where it is sought to take from the receiver the title to or possession of property held by him.

No distinction has ever been drawn between affirmative action and failure to act or "quiescence." As an illustration, in *Texas & Pacific R. R. Co. v. Cox*, 145 U. S. 593, the whole basis of the suit, which was for personal injuries, was defective condition of the roadbed of the railroad. The right to sue the receiver without leave was sustained, and the alleged distinction between acts and failure to act was not even raised. State court decisions on the point have been to the same general effect. As illustrative of these, we cite *Robinson v. Mills*, 65 Pac. (Mont.) 114, in which a receiver was sued for failure to repair streets; and *Fullerton v. Fordyce*, 25 S. W. (Mo. Sup.) 587, which was a suit for damages for failure to repair a station platform.

Section 125 has thus been construed and interpreted as embracing suits arising out of forbearance, inaction, failure to act and "quiescence" of receivers. The same interpretation should be placed upon Section 76.

**Intervenor's Point II:**

Intervenor here asserts that the petition for removal fails to allege sufficient facts to justify removal under the statute; in other words that it is subject to a general demurrer.

It is first claimed (pp. 15-17) that the petition for removal was bad because it alleged no *facts* disclosing that the suit had been brought for or on account of *acts done* under color of Petitioners' office. The amended and supplemental petition, as admitted by Intervenor on page 15, referred to a complete copy of the petition on file in the State court (Petn. for Mand., 26). In our reply to Point I we have already shown that the suit in the State court was one "on account of an act done," within the true meaning of Section 76. The *facts*, respecting the true nature of the asserted cause of action, could not be more fully alleged than by tender of a copy of plaintiff's petition. In that petition the Trustees are sued solely as Trustees. Their only connection with the suit is therein shown to be official and not at all personal.

It is then said (p. 17) that—

> "It is nowhere alleged in the petition to the lower court for certiorari, nor is it shown in the exhibits thereto, that petitioners in their official capacity have done or suffered anything to be done, either of commission or omission, upon the authority, express or implied, of the Federal Court of Missouri."

In the original petition for removal (Petn. for Mand., 16-25) it was alleged that Missouri Pacific Railroad Company had filed a re-organization petition in the proper court; that the corporate Petitioners, as its subsidiaries, had filed similar petitions in the same proceed-

ing; that the filing of such petitions had been duly approved (p. 18). Copies of these petitions were attached to the supplemental petition for removal as Exhibits "A" and "C" (pp. 28, 37). It was also alleged that orders had been entered (Exhibits "B" and "D," attached to the supplemental petition, pp. 32, 42) directing the debtors, until otherwise ordered, to manage and operate their properties and to conduct their business as railroad companies subject to the control of the court (pp. 18-20); that later the Trustee Petitioners were appointed and qualified as such and were directed to operate the properties with the powers previously vested in the debtors, and some further powers (pp. 20-21). Copies of the orders appointing the Trustees were attached to the supplemental petition (pp. 46, 50) as Exhibits "E" and "F." It was alleged (pp. 16-18) that the suit had been filed against the Petitioners in their official capacity; that all of them were officers of the Federal court at St. Louis (p. 22); and the plaintiff's petition was referred to (p. 18) "for a further statement of the allegations and prayers thereof and of the nature and objects of said suit." Finally, it was averred that the case in the State court was "a suit for and on account of acts done under color of the office of your Petitioners, and each of them, and in the performance of the duties imposed upon your Petitioners, and each of them, as such officers of court" (p. 23).

The orders of the St. Louis court, directing the operation of the property, manifestly required an economical operation, in the interest of the creditors, rather than a wasteful one. Had the debtors or the Trustees given, on any line, more service than the traffic reasonably required they would have been guilty of a breach of duty under their several appointments. Act of June 16, 1933, Public No. 68, 73 Cong., Sec. 4.

To remove a case under Section 76, Title 28, a Federal officer is manifestly not required to admit that the acts charged against him were, in fact, committed. Plainly, he is only required to show that, if committed, they occurred in line of duty or were done under color of his office. If such were not the case, a petition for a removal, in many instances, would be tantamount to a confession of guilt or liability. In a murder case, the real defense may be that some person other than the defendant killed the deceased. In a negligence case against a Federal receiver the real defense may be that the acts of negligence charged in the complaint were not committed. The statute is to have a liberal construction, as this Court declared in *Colorado v. Symes, supra*. The courts, therefore, will not attach to the privilege of removal any such penalty or condition. As was said in *Cleveland, etc., Rd. Co. v. McClung*, 119 U. S. 454:

> "But the petition alleges an act done by the collector under color of his office, and seeks a recovery on that account. Such a suit is removable; and certainly the right to a removal is not taken away because the collector says in his defense that the act charged was not in fact done. If done by him, it was done under color of his office. The thing to be tried is whether it was done."

In the section of Intervenor's brief beginning near the bottom of page 17, reference is made to *Colorado v. Symes, supra*, and to *Maryland v. Soper*, 270 U. S. 9. The State court cases involved in those decisions were criminal prosecutions. A Federal officer, seeking to remove a prosecution in which he is indicted, say, for assaulting or killing a named individual on a certain date, must evidently disclose in his petition for removal something of the facts relied upon to show that his part

in the transaction was official rather than personal. But where the effort is to remove a civil case, the petition or complaint in the State court will usually disclose the character of the officer and the official nature of the acts charged against him. If it does, a copy of the complaint makes the best possible showing with respect to the nature of the suit, the petitioner's office, and the connection between them.

**Intervenor's Point III:**

If we correctly analyze this point, it may be restated as follows:

The District Court, under Section 46, Title 11, U. S. C., has no jurisdiction (except in cases such as diversity of citizenship or of Federal questions, which are not here present) of a controversy between a trustee in bankruptcy and an adverse claimant concerning property acquired or claimed by the trustee; this is such a controversy; there can be no removal to a court which is without jurisdiction; the court to which removal is sought can be held to have jurisdiction only by deciding that the Act of 1916 (Section 76, Title 28) impliedly repealed the limitation thus placed by Section 46, Title 11, on the jurisdiction of the District court; and that there was no such repeal.

This argument falls completely because of two considerations:

(a) The suit in the State court is not a mere "controversy * * * concerning the property acquired or claimed by the Trustees." It is also a suit in which Intervenor seeks a recovery of damages against the Trustees. These damages, so sought, are not merely representative of the rental or other value of the property alleged to have been

withheld from the Intervenor by the Trustees, and thus merely incidental to the question of title, but are based upon other and different considerations. In part, at least, the damages sought represent an alleged depreciation in the market value of other property neither held nor claimed by the Trustees, claimed to have been caused by the operation by the Trustees of the property committed to them, and by the manner in which they propose to operate it in the future.

(b) Intervenor with respect to the damages which it seeks to recover in the State court is not an "adverse claimant" of property and to that extent the controversy in the State court is not one "between Trustees, as such, and adverse claimants."

In our main brief (pp. 7, 51-54) we showed that the right of removal under Section 76, Title 28, U. S. C., could not be defeated by the joinder, as co-defendant, of another party who is not a Federal officer. It seems plain that the right of removal under that section cannot be defeated by joining with a removable controversy another controversy or cause of action which otherwise would not be removable. In fact the joinder, as co-defendants, of persons not entitled to remove under Section 76 (because they are not Federal officers) necessarily implies that the complaint in the State court involves controversies (with the non-officers) which would not be removable except for the fact that they are coupled with a controversy which is removable under the terms of that section.

Therefore, inasmuch as the quoted section of the Bankruptcy Act does not touch the case, and cannot, in this controversy at least, conflict with Section 76, Title 28, U. S. C., it is useless to consider the question of implied repeal.

**Intervenor's Point IV:**

While we entertain grave doubts whether a trustee appointed under Section 77 of the Banruptcy Act (Act of March 3, 1933) is subject to all of the limitations imposed by law upon ordinary trustees in bankruptcy, it seems unnecessary, in the present case, to argue that question. An ordinary trustee would have the right to remove the case with which we are concerned. Section 46, Title 11, U. S. C., as we have shown, does not stand in the way. If an ordinary bankruptcy trustee may remove, cetainly these may, for Section 77 (c) of the Bankruptcy Act provides that they "shall exercise all the powers of a trustee appointed under Section 44 or any other section of this Act."

**Intervenor's Point V:**

It is likewise unnecessary in the present case to reach the conclusion from which Intervenor (p. 34) shrinks; namely, that Section 76, Title 28, U. S. C., as amended in 1916, repealed Section 46, Title 11, U. S. C. As we have shown, Section 46, Title 11, has no application to the present case because the suit in the State court is not solely a controversy "concerning the property acquired or claimed by the Trustees." It will be time enough to consider the question of repeal by implication when the Court has for decision a case to which Section 46, Title 11, is applicable.

It may be observed, however, that in our view counsel for Intervenor is mistaken as to which of these sections is a general and which a special act. The general grant of jurisdiction to the District courts in bankruptcy matters is contained in Title 28, Section 41 (19). Section 46 (a) of Title 11 is another general grant of jurisdiction,

with a limitation, over controversies, legal and equitable, between trustees in bankruptcy and adverse claimants of the property acquired or claimed by the trustees. On the other hand, Section 76 of Title 28, is not a general grant of jurisdiction. It is not even a general removal statute. It is a section which deals with the acquisition of jurisdiction, in certain special cases, by means of a special procedure for removal. To us, therefore, it appears that the special or particular act is contained in Section 76; and that by comparison Section 46, Title 11, is exceedingly general.

**Intervenor's Point VI:**

Intervenor has apparently overlooked a fact pointed out in our main brief (p. 73). Section 125, Title 28, U. S. C., was originally passed as Section 3 of the Act of March 3, 1887. It was one of three sections which were added to a House measure in the Senate. The other added provisions included the portion of Section 71, Title 28, concerning the finality of orders remanding suits to State courts and a declaration that nothing in the act should be deemed to repeal or affect any jurisdiction or right mentioned in certain sections of the Revised Statutes, including Section 643, which now appears as Section 76, Title 28, of the Code. In other words, the same act under which Section 125 came into existence distinctly preserved the rights guaranteed by the removal statute (Section 76), which is substantially the same in the present Code as it was in Section 643 of the Revised Statutes with the exception of the additions made by the Acts of 1875 and 1916, by which its benefits were extended to officers of Congress and of Federal courts. Under these circumstances, it is difficult to conceive of any question of repeal by implication as between

Sections 76 and 125 of Title 28, U. S. C. There may be a call for construction and interpretation, but hardly for any serious consideration of a repeal by implication. However, if the question of repeal by implication should arise—and to us it seems quite plain that it does not arise in this case—the express preservation of the rights guaranteed by Section 643 of the Revised Statutes, in the very Act which gave birth to what is now Section 125 of Title 28, would make a cogent argument that if either must repeal the other the actor must be the section which was so solicitously and expressly preserved in its full vigor by Section 5 of the Act of March 3, 1887.

It would profit nothing to argue the academic question of the effect of the removal provisions of Section 76, Title 28, on the anti-removal provisions of the Federal Employers' Liability Acts (Section 56, Title 45). The Employers' Liability Acts are in no way involved in the present case. If it should be true that a suit brought in a State court under the Employers' Liability Acts may not be removed to a Federal court under Section 76 of Title 28, it by no means follows that the suit brought by the Intervenor, which has nothing to do with those Acts, cannot be removed.

## Conclusion

The ground upon which the question of removability was decided by the Circuit Court of Appeals in *Ruff v. Gay*, 67 Fed. (2d) 684, adversely to the contention of Petitioners, seems to have been abandoned by the Intervenor. The Intervenor has submitted its own independent contentions against the right of removal. We believe those contentions have been shown to be unsound. We recognize that the writ applied for is not a

matter of right, and that its issuance lies within the sound discretion of this Court. However, we believe that a clear case has been made for the exercise of that discretion.

The simple words of the statute are adequate to authorize the removal sought. The history of the statute and the decisions of this Court show clearly that the purposes of the statute were such as to require a liberal, rather than a strict or narrow, construction. The case sought to be removed lies within the very terms of the statute. There is no other Federal statute which precludes removal. In its return to the rule to show cause the District Court declared that the reason for its refusal to consider the case upon removal was not predicated upon any assumed deficiency in the application to remove, but rested solely on the then very recent decision of the Circuit Court of Appeals in *Ruff v. Gay, supra.* Under the statute, the Petitioners clearly had a right to remove the case from the State to the Federal court. Their right of removal was defeated, for the time being, by what appears to us to have been an erroneous construction of the statute by the Circuit Court of Appeals. Their right to remove, which is a right jealously guarded by Congress (Section 5 of the Act of March 3, 1887, 24 Stat. 553), can be preserved only by the issuance of the writ applied for. We respectfully pray that the Court exercise its discretion and direct the issuance of the writ.

Respectfully submitted,

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Houston, Texas,
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